

SUBJECT INDEX

	Page
Statement	1
Facts	2
Issues presented	3
I.	
Taking a sample of blood does not constitute a violation of due process	3
II.	
A person has no right to decline a blood test	4
III.	
Taking sample of blood does not constitute an unlawful search	5
IV.	
The Supreme Court of the United States should not take jurisdiction to review an order where no opinion was delivered by the highest state court	6
Conclusion	7
Appendix A. California Vehicle Code Sec. 23102A	
App. p.	1
Appendix B. California Vehicle Code Sec. 23101	
App. p.	2

TABLE OF AUTHORITIES CITED

Cases	Page
Breithaupt v. Abram, 352 U.S. 432, 1 L. ed. 2d 448 ..	3
Howard, In re, 208 Cal. App. 2d 709	5
Martin, In re, 58 Cal. 2d 509	5
Newbern, In re, 175 Cal. App. 2d 862	5
People v. Bellah, 237 A.C.A. 129	4
People v. Conterno, 170 Cal. App. 2d Supp. 817	4, 5
People v. Duroncelay, 48 Cal. 2d 766	3, 4, 5
People v. Fuller, 236 A.C.A. 1016	4
People v. Haeussler, 41 Cal. 2d 252	3
People v. Huber, 232 Cal. App. 2d 663	3, 4, 5
People v. Pack, 199 Cal. App. 2d 857	5
People v. Robinson, 62 Cal. 2d 889	5
People v. Winston, 46 Cal. 2d 151	5
Stembridge v. State of Georgia, 343 U.S. 541, 96 L. ed. 1130	6

Statutes

California Constitution, Art. I, Sec. 13	4
California Vehicle Code, Sec. 12951	1
California Vehicle Code, Sec. 23101	2
California Vehicle Code, Sec. 23102	1

IN THE
Supreme Court of the United States

October Term 1965
No. 658

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

**Brief of Respondent in Opposition to Petition
for Writ of Certiorari.**

Statement.

Petitioner was charged by the People of the State of California in a verified complaint with a violation of Sections 23102 [Appx. A] and 12951 of the Vehicle Code of the State of California, misdemeanors.

He was duly arraigned, informed of the charges against him and of his legal rights, entered a plea of not guilty and demanded a jury trial. Prior to trial Count II was dismissed.

Petitioner was convicted of violating Section 23102, sentenced to 30 days in the County Jail, and fined \$250.00. He appealed to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, which court affirmed the judgment

of conviction without opinion. A petition for rehearing and/or certification to the District Court of Appeal was denied. Petitioner now seeks a writ of certiorari in this court.

Facts.

A police officer, arriving at the scene of an automobile accident, observed that Lowell Eaker was already in the ambulance and petitioner was being placed in the ambulance [R. T. p. 118, line 16-20]. The officer observed petitioner's face at this time and noted his eyes were bloodshot and watery and had a glassy appearance. An odor of alcohol was on petitioner's breath [R. T. p. 68, lines 11-19]. After an investigation at the scene, the officer determined that the vehicle had been driven on the wrong side of the street [R. T. p. 95, lines 19-25]. Eaker told the officer that petitioner was the driver of the vehicle [R. T. p. 89, lines 11-13]. At the hospital the officer noted petitioner's speech was slurred, and he formed the opinion that petitioner was under the influence of alcohol [R. T. p. 70, lines 21-22; p. 71, lines 1-3]. Petitioner was arrested at the hospital for a violation of Section 23101 of the Vehicle Code [Appx. B] and informed that he was entitled to the services of an attorney, that he could remain silent, and that anything he said could be used against him [R. T. p. 70, lines 13-16].

The officer asked petitioner if he had any objection to the taking of a blood sample and he replied he did not [R. T. p. 97, lines 12-13]. When the doctor was preparing to extract the blood petitioner said he didn't think he should do it as his attorney advised him not to [R. T. p. 98, lines 2-10]. Petitioner stated he would not fight the extraction of blood as the officer had told him

he would indicate in his report that petitioner had objected and had not used any physical force in his objection. The blood was extracted from petitioner by Dr. Brooks under standard medical procedure [R. T. p. 113, lines 16-19].

An analysis of the blood sample introduced in evidence resulted in a reading of .18 blood alcohol [R. T. p. 155, line 18-20]. An expert testified that all persons would be under the influence of alcohol with this blood alcohol reading [R. T. p. 157, lines 14-16].

ISSUES PRESENTED.

I.

Taking a Sample of Blood Does Not Constitute a Violation of Due Process.

A blood test taken by a skilled technician is not such "conduct that shocks the conscience," nor such a method of obtaining evidence that it offends a "sense of justice."

Breithaupt v. Abram, 352 U.S. 432, 1 L. ed. 2d 448;

People v. Haeussler, 41 Cal. 2d 252;

People v. Duroncelay, 48 Cal. 2d 766;

People v. Huber, 232 Cal. App. 2d 663.

The blood sample was extracted by a doctor in a medically approved manner. No force was used during the extraction of the blood. Extraction of blood for testing purposes is an experience many persons undergo daily without hardship or ill-effect. Such removal of blood does not constitute brutality, shock the conscience or deprive one of due process of law.

Even if compulsion is used in taking the blood sample, admission in evidence of the blood is not a denial of due process.

People v. Duroncelay, supra;

People v. Conterno, 170 Cal. App. 2d Supp. 817.

Blood alcohol tests may serve to exonerate the accused as well as to convict.

People v. Bellah, 237 A.C.A. 129.

II.

A Person Has No Right to Decline a Blood Test.

A defendant under lawful arrest does not have any constitutional right under California Constitution, Article I, Section 13, giving a privilege against self-incrimination, to decline a blood alcohol test, properly administered, and no federal constitutional right is violated by requiring him to submit to such a test.

People v. Conterno, supra.

The privilege against self-incrimination relates only to testimonial compulsion and not to real evidence.

People v. Duroncelay, supra;

People v. Huber, supra;

People v. Fuller, 236 A.C.A. 1016.

The introduction of the blood sample in evidence does not violate the privilege against self-incrimination as that privilege is limited to the right of an accused not to be compelled to orally testify against himself at his trial.

III.

**Taking Sample of Blood Does Not Constitute
an Unlawful Search.**

A search may be made incident to a lawful arrest.

People v. Winston, 46 Cal. 2d 151;

People v. Duroncelay, supra;

People v. Robinson, 62 Cal. 2d 889.

Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to the arrest, and the search is not unlawful merely because it precedes rather than follows the arrest.

People v. Duroncelay, supra.

The efficacy of a blood test depends upon it being made as soon as possible after the time of the offense. The intoxicating effect of alcohol diminishes with the passage of time.

In re Newbern, 175 Cal. App. 2d 862;

In re Howard, 208 Cal. App. 2d 709;

In re Martin, 58 Cal. 2d 509.

The making of a blood alcohol test without the petitioner's consent does not violate the Fourth Amendment to the United States Constitution.

People v. Conterno, supra;

People v. Pack, 199 Cal. App. 2d 857.

In *Huber, supra*, a blood sample was withdrawn not for the purpose of treating the defendant, nor for saving his life, nor for his direct benefit, but was taken for the purpose of reducing the alcohol in defendant's blood

to possession—to protect the alcohol content in the blood from destruction and to preserve it for presentation to the court. This was not an unreasonable search, nor was it a denial of due process of law.

Petitioner's affidavit states that the blood sample was taken prior to his arrest. While the prosecution did not controvert petitioner's affidavit at the hearing on the motion to suppress, the evidence presented at trial showed the arrest was made before the extraction of the blood [R. T. p. 70, line 13]. No testimony was presented by petitioner during the trial as to the time of the arrest in relation to the taking of the blood sample.

The taking of the blood sample incident to the lawful arrest of petitioner was not an unreasonable search.

IV.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

The record and the petition for writ of certiorari disclose that no opinion was delivered by the Appellate Department of the Superior Court for Los Angeles County when the judgment was affirmed. A Memo setting forth the reasons for denying the petition for rehearing and/or certification was prepared by the court.

In *Stembridge v. State of Georgia*, 343 U.S. 541, 96 L. ed. 1130, it was held that, where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a non federal ground, this court will not take jurisdiction to review the judgment.

Conclusion.

The petition for writ of certiorari does not disclose that there has been a violation of petitioner's rights under the federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

It is urged that the petition be denied.

Respectfully submitted,

ROGER ARNEBERGH,

City Attorney,

PHILIP E. GREY,

Assistant City Attorney,

WM. E. DORAN,

Deputy City Attorney,

MICHAEL T. SAUER,

Deputy City Attorney,

Attorneys for Respondent.

APPENDIX A.

California Vehicle Code Section 23102A

It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway.

APPENDIX B.

California Vehicle Code Section 23101

Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony. . . .

